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No. 941507

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

AEROLINEAS ARGENTINAS S.A.,

Petitioner,

vs.

MARO LEATHER CO.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE TERM, FIRST DEPARTMENT, OF THE SUPREME COURT OF THE STATE OF NEW YORK

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Will this Court resolve the conflict between New York State and the Second Circuit Court of Appeal and the highest courts of Great Britain and the Netherlands, in the interpretation of Warsaw Convention art. 26(2), as to whether failure to deliver one or more packages of an air shipment requires written notice of claim to the carrier within seven days of receipt of the balance of the shipment?

2. Will this Court give effect to the term "partial loss" in Cargo Tariff Rule No. 23 as filed with the Civil Aeronautics Board by air carriers, to apply it to a carrier's failure to deliver one or more packages of an air shipment, and requiring written notice of claim by the consignee to the carrier within seven days of receipt of the balance of the shipment?

3. Will this Court resolve the three-way conflict among New York State, the Fifth Circuit Court of Appeals, and the Second and Seventh Circuit Courts of Appeals and other courts within and without the United States, in the interpretation of Warsaw Convention art. 22, as to whether prejudgment interest under state law can be assessed against a carrier so as to allow the total judgment to exceed the Convention's limitation on damages based on the weight of the cargo involved?

LIST OF PARTIES

Petitioner Aerolineas Argentinas S.A. is the corporate successor to Aerolineas Argentinas Empresa del Estado, the original defendant below. A third-party claim had been interposed by Aerolineas Argentinas against Trans World Airlines, Inc., but was discontinued prior to trial. Respondent Maro Leather Co. was the original corporate plaintiff below.

The following statements are presented in accordance with Rule 29.1 of the Rules of the Supreme Court of the United States.

A majority of the stock of petitioner Aerolineas Argentinas, S.A., is owned by Iberia Lineas Aereas de España, S.A. Petitioner's only corporate subsidiary is Cielos del Sur S.A.

Petitioner believes that respondent Maro Leather Co. has no corporate parents or subsidiaries.

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IN THE

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OCTOBER TERM 1994

AEROLINEAS ARGENTINAS S.A.,

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—v.—

MARO LEATHER CO.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE TERM, FIRST DEPARTMENT, OF THE SUPREME COURT OF THE STATE OF NEW YORK

Petitioner Aerolineas Argentinas S.A. respectfully prays that a writ of certiorari be issued to review the decision of the Appellate Term, First Department, of the Supreme Court of the State of New York, entered in these proceedings on July 19, 1994, and now final. Review is also sought of a prior nonfinal decision of the Supreme Court of the State of New York, Appellate Division, First Department in the same case entered December 20, 1988.

OPINIONS BELOW

I. Prejudgment Interest

The July 19, 1994 Order and Decision of the Appellate Term affirming the judgment of the Civil Court of the City of New York, County of New York, is reported at 161 Misc. 2d 920, 617 N.Y.S.2d 617, and is reprinted in the Appendix hereto as Appendix A.

The trial transcript of proceedings on February 25, 1991 containing the findings of fact of the trial judge supporting the judgment entered August 26, 1992, and such judgment, are not reported but are reprinted in the Appendix hereto as Appendix B.

The October 13, 1994 Order of Appellate Term denying reargument of its July 19, 1994 order or leave to appeal to the Appellate Division is not reported but is reprinted in the Appendix hereto as Appendix C. The Order of the Appellate Division denying leave to appeal from the July 19, 1994 order of Appellate Term is not reported but is reprinted in the Appendix hereto as Appendix D. Defendant's Notice of Appeal from such order to the New York Court of Appeals is reprinted in the Appendix hereto as Appendix E. The February 14, 1995 Order of the Court of Appeals dismissing such appeal is reported at 1995 N.Y. LEXIS 220 and is reprinted in the Appendix hereto as Appendix F.

II. Notice of Claim

The December 20, 1988 Order and Decision of the Appellate Division, First Department, of the Supreme Court of the State of New York reversing the October 21, 1987 order of the Appellate Term, First Department is reported at 142 A.D.2d 265, 535 N.Y.S.2d 982, and is reprinted in the Appendix hereto as Appendix G.

The Order and Decision of Appellate Term reversing the September 23, 1986 order of the Civil Court of the City of New York is not reported but is reprinted in the Appendix hereto as Appendix H.

The Order and Decision of the Civil Court of the City of New York entered September 23, 1988 is not reported but is reprinted in the Appendix hereto as Appendix I.

The March 16, 1989 Order of the Appellate Division, denying leave to appeal to the Court of Appeals of the State of New York is not reported but is reprinted in the Appendix hereto as Appendix J.

JURISDICTION

The Order of the Appellate Term, First Department affirming the judgment below was entered on December 13, 1994. This Petition for a Writ of Certiorari is filed within ninety days of that date.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257 (1988).

CONSTITUTIONAL, TREATY, AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause, United States Constitution, Article VI, clause 2, provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876, 137 L.N.T.S. 11 (the "Warsaw Convention"), Article 22, provides:

> Article 22 (Official French Text[1])
>
> (1) Dans le transport des personnes, la responsibilité du transporteur envers chaque voyageur est limitée à la somme de cent vingt cinq mille francs. Dans le cas où, d'aprè la loi du

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[1] "Because the only authentic text of the Warsaw Convention is in French, the French text must guide our analysis." *Eastern Airlines, Inc. v. Floyd*, 499 U.S. 530, 535, 111 S. Ct. 1489, 1493, 113 L. Ed. 2d 569, 577 (1991).

tribunal saisi, l'indemnité peut être fixée sous forme de rente, le capital de la rente ne peut dépasser cette limite. Toutefois par une convention spéciale avec le transporteur, le voyageur pourra fixer une limite de responsibilité plus élevée.

(2) Dans le transport de bagages enregistrés et de marchandises, la responsibilité du transporteur est limitée à la somme de deux cent cinquante francs par kilogramme, sauf déclaration spéciale d'intérêt à la livraison faite par l'expéditeur au moment de la remise du colis au transporteur et moyennant le paiement d'une taxe supplémentaire éventuelle. Dans le cas, le transporteur sera tenu de payer jusqu'à concurrence de la somme déclarée, à moins qu'il ne prouve qu'elle est supérieure à l'intérêt réel de l'expéditeur à la livraison.

(3) En ce qui concerne les objets dont le voyageur conserve la garde, la responsibilité du transporteur est limitée à cinq mille francs par voyageur.

(4) Les sommes indiquées ci-dessus sont considérées comme se rapportant au franc français constitué par soixante-cinq et demie milligrammes d'or au titre de neuf cents millièmes de fin. Elles pourront être converties dans chaque monnaie nationale en chiffres ronds.

Article 22 (American English Translation)

(1) In the transportation of passengers the liability of the carrier for each passenger shall be limited to the sum of 125,000 francs. Where, in accordance with the law of the court to which the case is submitted, damages may be awarded in the form of periodical payments, the equivalent capital value of the said payments shall not exceed 125,000 francs. Nevertheless, by special contract, the carrier and the passenger may agree to a higher limit of liability.

(2) In the carriage of checked baggage and of goods, the liability of the carrier shall be limited to a sum of 250 francs per kilogram, unless the consignor has made, at the time when the package was handed over to the carrier, a special declaration of the value at delivery and has paid a supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless he proves that that sum is greater than the actual value to the consignor at delivery.

(3) As regards objects of which the passenger takes charge himself the liability of the carrier shall be limited to 5,000 francs per passenger.

(4) The sums mentioned above shall be deemed to refer to the French franc consisting of 65½ milligrams of gold at the standard of fineness of nine hundred thousandths. These sums may be converted into any national currency in round figures.

Article 26 of the Warsaw Convention provides:

Article 26 (Official French Text)

(1) La réception des bagages et marchandises sans protestation par le destinataire constituera présomption, sauf preuve contraire, que les marchandises ont été livrées en bon état et conformément au titre de transport.

(2) En cas d'avarie le destinataire doit adresser au transporteur une protestation immédiatement après la découverte de l'avarie et, au plus tard, dans un délai de trois jous pour les bagages et de sept jours pour les marchandises à dater de leur réception. En cas de retard, la protestation devra être faite au plus tard dans les quatorze jours à dater du jour où le bagage ou la marchandise auront été mis à sa disposition.

(3) Toute protestation doit être faite par réserve inscrite sur le titre de transport ou part un autre écrit expédié dans le délai prévu pour cette protestation.

(4) À défaut de protestation dans les délais prévu, toutes actions contre le transporteur sont irrecevables, sauf le cas de fraude de celui-ci.

Article 26 (American English Translation)

(1) Receipt by the person entitled to the delivery of baggage or goods without complaint shall be *prima facie* evidence that the same have been delivered in good condition and in accordance with the document of transportation.

(2) In case of damage, the person entitled to delivery must complain to the carrier forthwith after the discovery of the damage, and, at the latest, within 3 days from the date of receipt in the case of baggage and 7 days from the date of receipt in the case of goods. In case of delay the complaint must be made at the latest within 14 days from the date on which the baggage or goods have been placed at his disposal.

(3) Every complaint must be made in writing upon the document of transportation or by separate notice in writing dispatched within the times aforesaid.

(4) Failing complaint within the times aforesaid, no action shall lie against the carrier, save in the case of fraud on his part.

Article 33 of the Warsaw Convention provides:

Article 33 (Official French Text)

Rien dans la présente Convention ne peut empêcher un transporteur de refuser la conclusion d'un contrat de transport ou de formuler des règle-

ments qui ne sont pas en contradiction avec les dispositions de la présente Convention.

Article 33 (American English Translation)

Nothing contained in this convention shall prevent the carrier either from refusing to enter into any contract of transportation or from making regulations which do not conflict with the provisions of this convention.

Sections 5001, 5002 and 5004 of the New York Civil Practice Law and Rules (McKinney 1992) ("CPLR") provide:

§ 5001. Interest to verdict, report or decision.

(a) Actions in which recoverable. Interest shall be recovered upon a sum awarded because of a breach of performance of a contract, or because of an act or omission depriving or otherwise interfering with title to, or possession or enjoyment of, property, except that in an action of an equitable nature, interest and the rate and date from which it shall be computed shall be in the court's discretion

(b) Date from which computed. Interest shall be computed from the earliest ascertainable date the cause of action existed, except that interest upon damages incurred thereafter shall be computed from the date incurred. Where such damages were incurred at various times, interest shall be computed upon each item from the date it was incurred or upon all of the damages from a single reasonable intermediate date.

(c) Specifying date; computing interest. The date from which interest is to be computed shall be specified in the verdict, report or decision. If a jury is discharged without specifying the date, the court upon motion shall fix the date, except that

where the date is certain and not in dispute, the date may be fixed by the clerk of the court upon affidavit. The amount of interest shall be computed by the clerk of the court, to the date the verdict was rendered or the report or decision was made, and included in the total sum awarded.

§ 5002. Interest from verdict, report or decision to judgment.

Interest shall be recovered upon the total sum awarded, including interest to verdict, report or decision, in any action, from the date the verdict was rendered or the report or decision was made to the date of entry of final judgment. The amount of interest shall be computed by the clerk of the court and included in the judgment.

§ 5004. Rate of Interest.

Interest shall be at the rate of nine percentum per annum, except where otherwise provided by statute.

STATEMENT OF THE CASE

I. The Facts

Maro Leather Co., a New Jersey corporation, was the consignee of an airfreight shipment of nine pallets of unfinished leather carried by Aerolineas Argentinas, the Argentine Airlines. Of the nine pallets, seven were received by Maro's trucker from Trans World Airlines, Aerolineas Argentinas's cargo handler, on February 1 and 2, 1984, but two were reported missing and were never thereafter found.

On February 10, 1984—eight days after receipt of the goods— Maro's agent filed a written notice of claim for the partial loss with the airline. The value of the missing leather was $23,024.90. The limitation on damages under Article 22 of the Warsaw Convention, based on the weight of the missing goods, was $24,000.

The airline's standard Cargo Tariff Rule No. 23, then filed with the Civil Aeronautics Board pursuant to Federal Aviation Act § 403, 49 App. U.S.C. § 1373 (1988), *repealed by* Revision of Title 49, Transportation, United States Code, Pub. L. No. 103-272 § 7(b), 108 Stat. 745, 1383) (current version codified at 49 U.S.C. § 41504), provided:

> No action shall be maintained in the case of damage to or partial loss of cargo unless a written notice, sufficiently describing the cargo concerned, the approximate date of the damage, and the details of the claim is presented to an office of Carrier within 7 days from the date of receipt thereof, in the case of delay, unless presented within 14 days from the date the cargo is placed at the disposal of the person entitled to delivery of the consignment, and in the case of loss (including non-delivery) unless presented within 120 days from the date of issue of the air waybill.

Maro's claim was denied by the airline based on failure to file a timely written notice of claim under this tariff and under Article 26 of the Warsaw Convention.

II. The Proceedings Below

Maro brought suit against the airline in New York City Civil Court in July 1985 (Complaint, Appendix K). Defendant's answer (Appendix L) raised defenses based, *inter alia*, on Articles 22 and 26 of the Warsaw Convention and on its tariffs. The First Complete Affirmative Defense alleged that "proper written notice of claim concerning [the] loss, damage, or delay [complained of] was not filed with defendant within the applicable time limit" provided in the contract of transportation, the tariffs, and the Convention. The Seventh Partial Affirmative Defense alleged that

under these same sources of law, "the liability, if any, of defendant for any loss, damage, or delay is limited."

In July 1986 plaintiff moved for partial summary judgment dismissing defendant's affirmative defense of failure to file a timely notice of claim, which was granted by decision-order of September 17, 1986 (Appendix I), the special term judge noting a "trend" toward treating shortages as "losses" rather than "partial losses" (A-33).

That determination was reversed on defendant's appeal to Appellate Term, and the action was ordered dismissed upon such defense, by order of October 21, 1987 (Appendix H), the court noting that it had recently examined the law when it had reversed one of the "trend" decisions relied on below, in which it had noted:

> Significantly, in cases of "damage to or partial loss" of cargo, unlike the case of a total loss where no shipment ever arrives (a total failure to deliver), the consignee is immediately aware of the carrier's breach and, thus, the short notice of claim requirement should not be relaxed.

Leather's Best Inc. v. Aerolineas Argentinas, 136 Misc. 2d 797, 799 (App. T. 1st Dep't 1987) (citations omitted), *rev'g* 131 Misc. 2d 426 (Civ. Ct. 1986).

The Appellate Term decision in turn was reversed and the action reinstated by the Appellate Division in December 1988 (Appendix G). After an extensive review of the existing precedents, and largely influenced by the District Court's and Second Circuit's decision in *Denby v. Seaboard World Airlines, Inc.*, 737 F.2d 172 (1984), *rev'g* 575 F. Supp. 1134 (E.D.N.Y. 1983), the Appellate Division concluded that the term "partial loss" in the Aerolineas Argentinas tariff must be limited to a shortage from a package and not extended to the loss of one or more whole packages, on the theory that (A-27):

> "loss (including non-delivery)" of an entire container or pallet must be distinguished from pilferage or theft from a sealed container. The former is readily brought to the carrier's attention, just as if the whole shipment were lost, when the consignee does not receive delivery of all goods on the manifest. The latter loss from theft, etc., however, is not readily noticeable and requires prompt notification to ensure investigation.

Leave to appeal to the New York Court of Appeals was thereafter denied by the Appellate Division[2] in March 1989 (Appendix J).

Following a bench trial, decision was issued in favor of plaintiff (Appendix B), in the course of which defendant reasserted its position that Article 22 of the Warsaw Convention limited prejudgment interest as well as the principal amount of damages, and that the Supremacy Clause required that this override local-law prejudgment-interest provisions of N.Y. CPLR 5001 & 5002.[3] The trial judge, re-

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[2]Under N.Y. CPLR 5602 (McKinney 1978), further appellate review of such a nonfinal order by the Court of Appeals may be allowed only in the discretion of the Appellate Division on motion; otherwise the issues may be reviewed by the higher court (if at all) only upon appeal from a final judgment, under *id.* 5501(a)(1).

[3]Mr. Sadowsky, for defendant, argued (A-9 to A-10):

> I ask The Court to pay judicial notice of The Warsaw Convention
>
> . . . .
>
> The purpose of The Warsaw Convention was to establish a sense of stability when The Warsaw Convention was promulgated many, many years ago. The Warsaw Convention did not address the issue of pre-judgment of interest as it felt that without having interest airlines and air carriers would be more disposed to settling their cases. The United States is a signatory to this Warsaw Convention and this is the supreme law of the land as a treaty of The United States as ratified by the congress and signed by the presi-

lying on *Eli Lilly Argentina, S.A. v. Aerolineas Argentinas*, 133 Misc. 2d 858, 508 N.Y.S.2d 865 (Civ. Ct. 1986), overruled defendant's objections and ordered that the judgment include prejudgment interest from the date of loss regardless of the Warsaw Convention limitation.

The resulting final judgment (A-12) for $41,182.40 including CPLR 5001 & 5002 interest at the CPLR 5004 rate was appealed to Appellate Term and affirmed (A-1) upon authority of *Domangue v. Eastern Air Lines, Inc.*, 722 F.2d 256, 262 (5th Cir. 1984), *Mahfoud v. Eastern Airlines, Inc.*, 17 Av. Cas. (CCH) 17,714 (W.D. La. 1982), *aff'd mem.*, 729 F.2d 777 (5th Cir. 1984), *aff'd by an equally divided court*, 474 U.S. 213, 106 S. Ct. 586, 88 L. Ed. 2d 522 (1985), and *Boehringer-Mannheim Diagnostics, Inc. v. Pan American World Airways, Inc.*, 737 F.2d 456 (5th Cir.), *cert. denied*, 469 U.S. 1186, 105 S. Ct. 951, 83 L. Ed. 2d 959 (1985)—a line of Fifth-Circuit cases that established discretionary prejudgment interest exceeding the Warsaw Convention weight limitation, as a matter of federal common law. The Appellate Term affirmed despite the trial judge's holding imposing interest under the mandatory terms of New York CPLR 5001, without making the find-

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dent. Whether we like it or not, state courts must abide by this precedent in the nature of the statute, in the nature of the *Deere* case and *O'Rourke* and other authorities which my opposing counsel has cited.

. . . .

I would ask The Court to not follow this *Eli Lily* case as I do not think, and I say this as an officer of the court, that it is good law. It has not been followed by any single state court in a Second Circuit or cited with approval. I think it is vulnerable to attack. Perhaps in today's mode of transportation the Warsaw Convention should be modified or changed in some way, but that scenario is not presented to this court. We can only go by what The Warsaw Convention says.

There is no indication that interest is applicable and I would advise that interest should be denied.

ings required by *Domangue* to support the court's exercise of discretion.

The Appellate Term thereafter denied defendant's motion for leave to appeal to the Appellate Division (Appendix C), as did the Appellate Division (Appendix D). Although defendant filed a notice of appeal to the Court of Appeals of New York (Appendix E), upon the premise that a construction of the Supremacy Clause of the U.S. Constitution was directly involved, the Court of Appeals on its own motion dismissed the appeal for lack of jurisdiction (Appendix F), evidently upon the theory that the decision below represented judicial construction of the treaty rather than a conflict between the terms of the treaty and the state prejudgment-interest statute, which would directly implicate the Supremacy Clause.[4] The dismissal of the appeal made final the decision of Appellate Term of July 19, 1994 as well as the Appellate Division decision of December 20, 1988.

The federal claims now pursued were thus raised at the earliest stage of the pleadings and have been continually reasserted throughout the proceedings below.

REASONS FOR GRANTING THE WRIT

I. There Is Conflict Among State and Federal Courts and Courts Abroad as to the Rule Requiring a Notice of Claim Under the Warsaw Convention for Partial Loss of Air Cargo

Article 26 of the Warsaw Convention requires written notice of claim as a condition precedent to suit based on "damage" ("*avarie*") to air cargo, but whether this term

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[4]CPLR 5601(b)(1) provides that an appeal lies as of right to the Court of Appeals "from an order of the appellate division which finally determines an action where there is directly involved the construction of the constitution of the state or of the United States." Clearly the Appellate Division disposition was final. No written decision was issued explaining the rationale for the Court of Appeals dismissal; the explanation here given was the argument made by plaintiff by letter-submission

should be interpreted to require such notice where part of the goods never arrives has been subject to conflicting rulings.

The definitive analysis of this question was undertaken in the British decision of *Fothergill v. Monarch Airlines Ltd.*, [1981] A.C. 251, 274-75 (H.L. 1980), a case where a passenger timely complained of damage to his suitcase but not of partial loss of its contents. Lord Wilburforce noted that the term "*avarie*", like "damage", was susceptible to a narrow interpretation—physical damage alone—or a broader sense which would include "physical damage, or loss, including partial loss". He noted that the latter interpretation would better accord with the purposes of Article 26, and as well accorded with French, Argentine, Belgian, and Swiss jurisprudence, and held the partial-loss claim untimely.

In Great Britain, independent of the *Fothergill* case, Parliament enacted the Warsaw Convention into positive law through the Carriage by Air Act 1961, 9 & 10 Eliz. 2, ch. 27, *amended by* Carriage by Air and Road Act 1979, 1979 ch. 28, to which the Convention as amended is annexed as Schedules. This latter amendment specifically provided, as regards art. 26:

> In Article 26(2) the references to damage shall be construed as including loss of part of the baggage or cargo in question and the reference to the receipt of the baggage or cargo shall, in relation to loss of part of it, be construed as receipt of the remainder of it.

Carriage by Air and Road Act 1979, 1979 ch. 28, § 2. Thus in Great Britain the *Fothergill* holding has been broadly implemented for all cases of partial loss.

An identical result was obtained by the supreme court of the Netherlands in *Affretair (Compagnie Gabonaise d'Af-*

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during the court's *sua sponte* review of the jurisdictional issue.

frètement Aérien) v. VOB (Versicherungsanstalt der Österreichischen Bundesländer Versicherungsaktiengesellschaft), RW 1982,50 (HR 1982) (reprinted in 7 J. AIR L. 173 (1982)), holding that where three cartons from a consignment of twenty were lost, this constituted "damage" within the meaning of art. 26 of the Convention. This decision was described in an accompanying commentary as "more than an affirmation of the ruling of the House of Lords," in *Fothergill*, since it applies to the total loss of a discrete number of packages rather than shortage from one or more packages. Note, Supreme Court of the Netherlands: Affretair v. VOB or Fothergill's Dutch Treatment: decision of 12 February 1982, 7 J. AIR L. at 176.

In the case of losses of cartons from a containerized shipment, *Fothergill* was followed in the U.S. by *Denby v. Seaboard World Airlines, Inc.*, 575 F. Supp. 1134, 1138-44 (E.D.N.Y. 1983) (Weinstein, C.J.), but this was reversed by the Second Circuit, 737 F.2d 172, 179-80, 182-83 (1984), because the factual record was unclear as to whether the shipment should be treated as of a single container or of multiple cartons, assuming but not deciding that this might affect the result.[5] The Second Circuit's sole authority for thinking that a different result might be had if individual cartons were lost was *Dalton v. Delta Airlines, Inc.*, 570 F.2d 1244 (5th Cir. 1978), *rev'g* 14 Av. Cas. (CCH) 17,219 (S.D. Fla. 1974). *Dalton* held that where racing dogs arrived dead at the airport of destination, they were "destroyed" goods rather than "damaged" goods within the meaning of art. 26(1), and thus no notice was required.

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[5]Although the case was remanded, it was settled prior to trial, and no further findings were made. It may be questioned, however, whether the distinction proposed by the Second Circuit might well be "incompatible with the language of the Convention." *Chan v. Korean Airlines, Ltd.*, 490 U.S. 122, 130, 109 S. Ct. 1676, 1681, 104 L. Ed. 2d 113, 124 (1989): If the meaning of *avarie* includes partial losses, why should it include some partial losses but not others?

In the wake of the Second Circuit's *Denby* decision, a multiplicity of results have developed within the United States, with most courts not bothering to examine the language of the treaty or its analyses in *Fothergill*.

One line of cases, e.g., *Butler's Shoe Corp. v. Pan American World Airways*, 514 F.2d 1283, 1285 n. 2 (5th Cir. 1975), draws the obvious conclusion that where no part of the shipment is delivered at all, no notice is required under art. 26. This is logically consistent with the text of the treaty, since there is no "receipt" of goods from which to measure the seven-day period.

Another line of cases holds that any kind of partial loss, as by pilferage, is "loss" rather than "damage" within the meaning of art. 26, and thus no notice is required: *St. Paul Insurance Co. v. Venezuelan International Airways, Inc.*, 807 F.2d 1543, 1546 (11th Cir. 1987) (loss of 24.5% by weight of tractor parts in two shipments; art. 26 held not to apply); *cf. Schwimmer v. Air France*, 87 Misc. 2d 147, 149, 384 N.Y.S.2d 658, 659 (Civ. Ct. 1976) (art. 26 notice held required for 4 damaged cases of personal goods but not for 7 cases not delivered; "Damage is damage and loss is loss").

The *Dalton* line of cases has since been limited to instances of dead livestock, rather than other types of "destruction". *Compare Hughes-Gibb & Co. v. Flying Tiger Line, Inc.*, 504 F. Supp. 1239 (N.D. Ill. 1981) (*Dalton* rule applied to breeding swine dead on arrival but not to those dying after delivery) *with Highlands Insurance Co. v. Trinidad and Tobago (BWIA International) Airways Corp.*, 739 F.2d 536 (11th Cir. 1984) (electronic parts dropped 18 ft. to floor not "destroyed" within meaning of *Dalton*) *and Maschinenfabrik Kern, A.G. v. Northwest Airlines, Inc.*, 562 F. Supp. 232 (N.D. Ill. 1983) (notice held necessary for "total destruction" of duplicating machines).

A further split has developed between cases that make a distinction between partial losses that involve shortage of contents from one or more packages and those that involve

one or more complete packages, as the case here below. Since these almost always involve consideration of tariff provisions, they will be discussed below.

To sum up, there is no uniformity of interpretation of art. 26 of the Warsaw Convention in this country as applied to the broader sense of "damage"("*avarie*") recognized in *Fothergill* as the best interpretation of these critical terms and implemented in Great Britain at least by legislative enactment. In a situation where international uniformity is paramount, the need for a consistent standard is evident.

II. There Is Conflict Among State and Federal Courts and Courts Abroad as to the Rule Requiring a Notice of Claim Under Tariffs for Partial Loss of Air Cargo

Article 33 of the Warsaw Convention allows air carriers to promulgate regulations covering situations not covered by the Convention provided they do not "conflict with" the Convention. Cargo Tariff Rule 23(b) adds two new categories to the Convention's two categories of "damage" and "delay" in art. 26—that of "partial loss" (requiring, as for damage, notice within seven days of receipt of the cargo) and of "loss (including non-delivery)" (requiring notice within 120 days of the issuance of the air waybill). The obvious intent of this tariff is to clarify the treatment of partial losses of baggage or cargo, and to fix a notice provision for the *Butler's Shoe* situation where no delivery ever takes place. This rule has been upheld as a permissible regulation under art. 33. *E.g. Famolare v. Seaboard World Airlines*, 15 Av. Cas. (CCH) 17,287 (N.Y. Sup. Ct. 1978).

The term "partial loss" has traditionally been interpreted under maritime law to mean any loss that is not an actual or constructive total loss of an entire cargo, and specifically including the total loss of a part of a shipment. *See, e.g., American Insurance Co. v. Griswold*, 14 Wend.

399, 472 (N.Y. 1835) (giving example of one hogshead of sugar washed overboard out of a shipment of twenty).

Some earlier aviation cases interpreted this tariff langage to apply to the total loss of one or more packages from a shipment, *e.g.*, *Travelers Indemnity Co. v. Alia Airlines*, 18 Av. Cas. (CCH) 17,687 (N.Y.C. Civ. Ct. 1984), *aff'd without opinion*, No. 84-630 (App. T. 1st Dep't April 2, 1985), as well as where part of the contents of a package were missing, *e.g. Hartford Fire Insurance Co. v. Aerolineas Argentinas*, 16 Av. Cas. (CCH) 17,940 (N.Y. App. T. 1981). The rule was, as the Appellate Term noted below in the present case, "the loss of one of a number of pallets constitutes a partial loss of the total shipment, not a total loss of part of the shipment, within the meaning of defendant's tariff" (A-31).

The Second Circuit's *Denby* decision, however, again introduced a note of confusion. Even though tariff interpretation of Rule 23(B) was not there involved,[6] subsequent courts used *Denby* as authority for holding that "partial loss" could be applied only in the *Hartford Fire Insurance* situation. Both *Siemens Corp. v. KLM Royal Dutch Airlines*, 19 Av. Cas. (CCH) 18,502 (N.Y. Civ. Ct. 1986), and the Appellate Division below (A-25 to A-28) relied on *Denby* to hold that partial loss of a discrete number of packages was not a "partial loss" under the tariff but a "loss (including non-delivery)". Such holdings were buttressed by the observation that missing packages should be obvious to the carrier (while missing contents from a package might not be), even though earlier cases firmly established that a carrier's actual knowledge of damage does not excuse a consignee's noncompliance with a tariff notice requirement, *e.g.*, *Stud v. Trans International Airlines*, 727 F.2d 880, 883 (9th Cir. 1984); *Amazon Coffee Co. v. Trans World Airlines, Inc.*, 18 Av. Cas. (CCH) 17,264, 17,264 (N.Y.

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[6]Seaboard's filed tariff was ambiguous as to whether Rule 23 applied to it, allegedly due to a clerical error. This was a factual issue to be explored on remand. 737 F.2d at 186-87.

Sup. Ct. 1983) (citing non-aviation cases), *modified on other grounds,* 111 A.D.2d 776, 490 N.Y.S.2d 523 (1985).

The purpose of a notice requirement, as noted by Lord Wilburforce in *Fothergill*, is "reasonably clear":

> It is: (1) to enable the airline to check the nature of the "damage"; (2) to enable it to make inquiries how and when it occurred; (3) to enable it to assess its possible liability, to make provision in its accounts and if necessary to claim on its insurers; (4) to enable it to ensure that relevant documents (for example, the baggage checks or passenger ticket, or the air waybill) are retained until the issue of liability is disposed of.

[1981] A.C. at 272 (quoted with approval in *Denby*, 737 F.2d at 177 n. 7). *See also Stud v. Trans International Airlines*, 727 F.2d at 883-84 ("One reason for the written notice requirement is to avoid endless speculation about who knew what and when they allegedly knew it."). None of these purposes is served by excusing a consignee from a short notice requirement by giving an artificial construction to the term "partial loss". This is especially the case where, as here, actual delivery to the consignee may be made by a contracted cargo handling company rather than the carrier itself. Rather, as a commercial reality, it is the consignee who is in the best position, if not the only position, to examine its shipment to determine whether it actually received all it was supposed to and in the condition it was supposed to be in. If not, it can best work to correct the situation or obtain recovery against the responsible party by filing its notice to the carrier and starting the claims process.

The existing multiplicity of interpretations serves no commercial purpose and, by doing violence to the plain language of the tariff provisions, only invites confusion. Only this Court can resolve this mishmash by accepting this case for review.

III. There is a Clear Three-Way Conflict Among Two Federal Circuits and New York State Courts as to Awarding Prejudgment Interest in Excess of the Warsaw Convention Weight Limitation

There is a conflict among federal courts and New York state courts as to the question of prejudgment interest in Warsaw Convention cases where the damages with interest would exceed the amount of liability prescribed under art. 22 of the Convention. This is a question unaddressed in this Court's consideration of *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 104 S. Ct. 1776, 80 L. Ed. 2d 273 (1984), and presented to this Court but likewise unresolved by *Eastern Airlines, Inc. v. Mahfoud*, 474 U.S. 213, 106 S. Ct. 586, 88 L. Ed. 2d 522 (1985), *aff'g by an equally divided court* 729 F.2d 777 (5th Cir. 1984), *mem. aff'g* 17 Av. Cas. (CCH) 17,714 (W.D. La. 1982). The question has received three different answers to date.

One view takes the plain wording of the Convention, informed by the drafters' primary intentions, as controlling. *O'Rourke v. Eastern Air Lines, Inc.*, 730 F.2d 842 (2d Cir. 1984), was a passenger death case governed by the Convention as modified by the Agreement Relating to Liability Limitations of the Warsaw Convention and the Hague Protocol, Agreement C.A.B. No. 18900, approved by order E-23680, May 13, 1966 (Docket 17325), 31 Fed. Reg. 7302 (1966), commonly known as the Montreal Agreement, a private agreement among airlines and the Civil Aeronautics Board which raised the passenger-injury liability limit to $75,000, inclusive of legal fees and costs, while eliminating "fault" as an issue to be litigated. Since the Montreal Agreement was silent as to prejudgment interest, the administrator of a deceased passenger sought prejudgment interest in addition to the $75,000 maximum award. The Second Circuit focused on the "liability of the carrier . . . shall be limited" language of art. 22 of the Convention, which is likewise silent as to interest, as well as fees and costs. The

court recognized the prime underlying purposes of the Convention was to limit air carriers' liability for damages to a fixed and definite sum and to provide a fixed and uniform body of international law to govern such determinations. While it noted that the objects of the Montreal Agreement were to increase compensation to passengers above the original Warsaw limit and to speed the resolution of claims, it could find no intention by the parties to that Agreement to modify the original Warsaw principles. 730 F.2d at 852. Although the Convention provided for application of local law in some of its articles, there was no such provision in art. 22; accordingly, interest above the revised $75,000 limit was denied. *Id.* at 853.

While *O'Rourke* was pending, the Fifth Circuit decided the issue differently. *Domangue v. Eastern Air Lines, Inc.*, 722 F.2d 256 (5th Cir. 1984), also a wrongful-death case, arose out of the same airplane crash as did *O'Rourke*. Concentrating on the speedy-compensation objectives of the Montreal Agreement in the context of a no-fault claim against an airline where there was no question that the $75,000 damage limit could be proved, the court held that equitable principles could support an award to a passenger of prejudgment interest "under the Warsaw/Montreal body of law". *Id.* at 262-63. In considering such a discretionary award, a judge would be bound neither by traditional common-law restrictions nor by state statutes, but should take into account such equitable factors as the span of time from the tort to the judgment, responsibilities for any delay, and achieving the goal of facilitating the disposition of bona fide claims. *Id.* at 262, 264.

The *O'Rourke* court acknowledged the *Domangue* decision in a footnote, 730 F.2d at 853-54 n.20, offering three reasons why it would not follow it: (1) establishing different rules in different countries (and the *O'Rourke* plaintiff sought interest under a state statute) would defeat the Warsaw Convention's purpose of international uniformity, (2) the speedy-disposition objective was not

supported by the history of the Montreal Agreement,[7] and (3) the *Domangue* rationale had no application in a case where, as in *O'Rourke*, full liability was not conceded by the defendant.

The Fifth Circuit has alone persisted in its *Domangue* holding, following it in *Mahfoud v. Eastern Airlines, Inc.*, 729 F.2d 777 (5th Cir. 1984, *mem. aff'g* 17 Av. Cas. (CCH) 17,714 (W.D. La. 1982), *aff'd by an equally divided court*, 474 U.S. 213, 106 S. Ct. 586, 88 L. Ed. 2d 522 (1985), and even extending it without comment to a cargo case—a claim wholly outside the subject-matter of the Montreal Agreement, *Boehringer-Mannheim Diagnostics, Inc. v. Pan American World Airways, Inc.*, 737 F.2d 456 (5th Cir.), *cert. denied*, 469 U.S. 1186, 105 S. Ct. 951, 83 L. Ed. 2d 959 (1985).

The Second Circuit has meanwhile extended the *O'Rourke* holding to cargo cases, *Exim Industries, Inc. v. Pan American World Airways, Inc.*, 754 F.2d 106 (2d Cir. 1985), and later cases have clarified that prejudgment interest would be freely available in Warsaw cases where the damage limitation was otherwise unavailable to the carrier, *e.g., Hollie v. Korean Air Lines Co.*, 834 F. Supp. 65 (S.D.N.Y. 1993) (using an average of Treasury Bill rates to determine interest).

Moreover, all other courts which have considered the question, other than New York state courts, have, upon considering both lines of decision, followed the Second Circuit: *e.g., Deere & Co., v. Deutsche Lufthansa Aktiengesellschaft*, 855 F.2d 385 (7th Cir. 1988); *Corio Brothers Investment Corp. v. Fast Air Carrier, S.A.*, 24 Av. Cas. (CCH) 17,719 (S.D. Fla. 1993); *The Limited Stores, Inc. v. Pan American World Airways, Inc.*, 65 Ohio St. 3d 66, 600

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[7]Moreover, as noted by this Court in *Air France v. Saks*, 470 U.S. 392, 407, 105 S. Ct. 1338, 1346, 84 L. Ed. 2d 289, 301 (1985), the parties to the Montreal Agreement waived defenses otherwise available under art. 20(1) of the Convention, but "they did not waive other provisions in the Convention that operate to qualify liability."

N.E.2d 1027 (1992). The Second Circuit rule is likewise the holding of decisions abroad, in England, *Swiss Bank Corp. v. Brink's M.A.T. Ltd.*, [1986] 1 Q.B. 853, and Australia, *S.S. Pharmaceutical Co. v. Qantas Airways Ltd.*, [1989] 1 Lloyd's Rep. 319 (Sup. Ct. N.S.W., Austl., Comm. Div. 1988), *aff'd*, [1991] 1 Lloyd's Rep. 288, 297 (Austl. Ct. App. 1990). No court outside the Fifth Circuit has followed *Domangue* in allowing discretionary interest beyond the Warsaw weight limitation.

The trial court and Appellate Term below, and one other New York state lower court, have claimed to follow *Domangue*, but have held otherwise and established a third line of decisions. *Eli Lilly Argentina, S.A. v. Aerolineas Argentinas*, 133 Misc. 2d 858, 861, 508 N.Y.S.2d 865, 867 (Civ. Ct. 1986), was an action for damage to chemical drums during loading. The parties stipulated that the amount of loss was the Warsaw Convention weight limitation of $18,360; the sole question presented for decision was whether plaintiff was entitled to prejudgment interest in excess of this amount. The court noted *Domangue*'s recognition that prejudgment interest constitutes payment for the use of money to which a plaintiff may be entitled, but ignored its holding that the Convention preempts state law on prejudgment interest, declaring: "The law of the State of New York is in accord. CPLR 5001 provides for interest in an action for property loss or damage from the earliest ascertainable date upon which the cause of action arose." *Id.* at 861, 508 N.Y.S.2d at 866-67. Without citation of further Warsaw authority, the court concluded: "Article 28 of the Warsaw Convention[8] may be interpreted to allow the

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[8]Warsaw Convention art. 28(1) provides for venue in Warsaw cases; art. 28(2) states: "Questions of procedure shall be governed by the law of the court to which the case is submitted." 49 Stat. at 3020-21. The *O'Rourke* court noted this as one of the five instances in the Convention where application of the law of the forum was permitted—none of which, it noted, allowed for prejudgment interest under local law. 730 F.2d at 853.

law of the forum on prejudgment interest," *id.*, and awarded prejudgment interest under CPLR 5001.

The decision of the trial judge in the instant case was expressly premised on the "decision and the reasoning of" *Eli Lilly* and awarded prejudgment interest—not according to the *discretionary* equitable principles espoused by the *Domangue* court—but under the *mandatory* provisions of CPLR 5001 (A-11). The Appellate Term affirmance did likewise (A-2). This is clearly a third road, awarding interest under state law in excess of a limitation unambiguously set forth in the treaty, justified under the rubric of treaty interpretation.

Thus again, under a multilateral treaty whose goal was internaional uniformity of law, a situation has developed where in one country alone multiple disparate rules are maintained. International air carriers face widely differing amounts of judgments on identical claims, depending upon venue of suit, depending on local interest rates, and even depending on the mood of the judge to whom the case is assigned, under a treaty whose original purpose was to establish a uniform rule of liability. Commercial realities, and the fulfillment of the expectations of the international community, require a more uniform rule, which this Court alone can provide.

CONCLUSION

As recently as this Court's decision in *Eastern Airlines, Inc. v. Floyd*, 499 U.S. at 546, 111 S. Ct. at 1499, 113 L. Ed. 2d at 584, it recognized that the original parties to the Warsaw Convention "were more concerned with protecting air carriers and fostering a new industry than providing full recovery to injured passengers" or consignees of cargo, and that the Convention must be construed to effect such purposes. Although changes in domestic law since 1929 increasingly favor consumers of goods and services, nevertheless the Convention, as "the supreme Law of the Land," is entitled to construction and recognition of its plain language in the light of its originally intended purposes. Commercially reasonable tariffs promulgated consistently with the Convention should be accorded like construction.

Petitioner respectfully submits that those purposes have *not* been recognized by the decisions of the New York state courts below, and moreover that such decisions are in stark conflict (a) in the case of partial losses of air cargo, with Judge Weinstein's decision in *Denby* and the internationally consistent rule of *Fothergill*, the British Carriage by Air and Road Act, and *Affretair*, and (b) in the case of prejudgment interest, with each of the *O'Rourke* and the *Domangue* lines of authority.

With the current multiplicity of rulings, international air carriers cannot predict the amount of interst on a baggage or cargo claim, nor can consignees predict whether they need to file a notice of claim for short shipments, since the answers to these issues largely depend on the forum where the claim may be heard.

Further, the judicial construction both of a multilateral treaty to which the United States is a party and of air tariffs filed with a federal agency, are peculiarly federal questions upon which a uniform national rule is needed, and which only this Court can provide.

For all the foregoing reasons, the present petition for a writ of certiorari should be granted.

Respectfully submitted,

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